AR. VE. PALANISAMY SERVAI v. S. V. LINGHAM.

[C. A. (Mathew C.J., Brown Ag. C.J. (S) and Spenser Wilkinson J.) April 21, 1954]

[Penang — F.M. Civil Appeal No. 26 of 1953]

Moneylenders Ordinance (Cap. 218), s. 4 — Promissory note — Delivery of security and repayment of amount outstanding in contract made unenforceable by s. 4 — Distinction from contracts which are illegal.

The respondent had obtained judgment dismissing a claim on a promissory note and an order that the promissory note sued on be cancelled and returned to the respondent, and that the respondent be entitled to possession of the title deeds. The appellant submitted that repayment of the amount still owing should be made a condition of the return of the title deeds.

Held, following Cohen v. Lester Ltd.[2]: if the respondent had been ordered to repay the amount still owing, it would have meant that the appellant was seeking to enforce the promissory note made unenforceable by section 4 of the Moneylenders Ordinance.

Lodge v. National Union Investment Co. Ltd.[1] distinguished on the ground that there repayment was ordered because the contract was illegal.

Cases referred to —

(1) *Lodge v. Union Investment Co. Ltd.* (1907) 1 Ch. 300.

(2) *Cohen v. Lester Ltd.* (1939) 1 K.B. 504.

(3) *R. M. N. Sathappa Chettiar v. Song Chwee Oon* (1939) M.L.J. 180.

CIVIL APPEAL.

Eusoffe Abdoolcader for the appellant.

R. D. Hume for the respondent.

Cur. Adv. Vult.

Mathew, C.J. [with whom Brown, Ag. C.J. (S.) and Spenser Wilkinson, J. agreed]: — This is an appeal against a judgment dismissing a claim on a promissory note and an order that the promissory note sued on be cancelled and returned to the respondent, and that the respondent is entitled to the possession of the title deeds mentioned in the proceedings. The appellant submits that the learned trial judge should have made the repayment of the amount still due and owing to the appellant a condition of the respondent getting back the title deeds.

The appellant bases his submission on the case of *Lodge v. National Union Investment Co. Ltd.*[1]. In this action, where the borrower was seeking to recover securities mortgaged to an unregistered moneylender, it was held that the mortgagee could not be ordered to give up to the mortgagor the securities the subject of the mortgage except upon the terms that the mortgagor should repay the money which had been advanced to him. The basis of the decision in this case is put shortly by Parker, J. (at p. 312):—

"In one word the gist of this kind of action is that the defendant, upon the circumstances of the case, is obliged by the ties of natural justice and equity to refund the money."

It is not disputed that the transaction, the subject of the suit, is unenforceable under section 4 of the Moneylenders Ordinance (Cap. 218) which is the law applicable to the transaction. The wording of section 4(1) of the Ordinance follows that of section 6 of the Moneylenders Act 1927.

The respondent relies on the case of *Cohen v. Lester Ltd.*[2] In that case:—

"The plaintiff deposited jewellery with the defendants, registered money-lenders, as security for money lent to her by them. The contract entered into by the plaintiff in respect of the loan and the security given by her were rendered unenforceable by failure to comply with the requirements of s. 6 ss. 2 of the Moneylenders Act 1927. The plaintiff brought an action against the defendants claiming an order for the delivery up of the jewellery. She then owed the defendants a sum in respect of the loan."

It was held that the plaintiff was entitled to the order which she claimed without being required to pay to the defendants the money which she owed them. In the course of his judgment, Tucker, J. considered the case of *Lodge v. National Union Investment Co. Ltd.*[1] *supra,* and distinguished it (at p. 507):—

"In my view, moreover, a distinction must be drawn between a case like that of Lodge v. National Union Investment Co. Ltd.,[1] where the contract between the parties was illegal, and a case like the present, where the contract is unenforceable, and I think therefore that the plaintiff is entitled to succeed. In passing I may mention that neither in Egan v. Langham Investments Ltd., (1938) 1 K.B. 667 nor in Stewart-Naylor v. London & Westminster Loan Discount Co. Ltd., (1937 Dec. 20 unreported), where the plaintiffs were granted declarations that certain contracts or bills of sale were illegal, void and/or unenforceable, was any point taken that a distinction was to be drawn between contracts which were illegal and those which were unenforceable, so in neither case was the matter considered by the Court."

This decision was followed in the case of *R. M. N. Sathappa Chettiar v. Song Chwee Oon*[3].

In my view, it would be contrary to the clear intention of the Moneylenders Ordinance to permit the appellant to retain the title deeds deposited with him by the respondent for the purpose of enforcing a contract unenforceable under the law. As is said by Tucker, J. in *Cohen v. Lester Ltd.*[2] *supra* (at p. 507):—

"In my opinion the true position is that, when the defendants maintain that they are entitled to keep this jewellery unless and until the plaintiff pays the money which she owes them, they are really seeking to enforce the contract of April 13, 1937, which they admit to be unenforceable under s. 6 of the Act."

I would dismiss this appeal with costs, and order the deposit to be paid out to the respondent's solicitors.

Appeal dismissed.

Solicitor for the appellant: *Ong Huck Lim.*

Solicitors for the respondent: *Hogan, Adams & Allen.*